Held, (1) that where an explanation is given by an accused which is consistent with innocence the Court must consider whether it might reasonably be true even though it is not convinced of its truth; (2) that where the complainant or other witness in a case is clearly an accomplice a judge or magistrate must state in his grounds of judgment that he has warned himself of this fact; and (3) that where a statement is used to impeach the evidence of a witness such statement must be properly proved.

*CRIMINAL APPEAL.*

*R. Ramani* for the Appellant.

*C. H. Whitton* for the Respondent.

**Russell, J.** : — I think that the only inference I can safely draw from the rather meagre grounds of the learned District Judge is that in this case he has misdirected himself as to the onus of proof in a criminal case. He has said in effect :—

1. That there are two conflicting stories and that he has to decide which one to believe;
2. That he has considered the evidence of the accused, the complainant and their witnesses;
3. That he does not accept the story of the accused and his witnesses;
4. That he believes the evidence of the complainant and his witnesses who corrobrate his story in material particulars.

He seems to have been of the opinion that the same degree of proof rest upon the accused to prove his story as rested upon the prosecution, whereas when an explanation is given by an accused which is consistent with innocence the Court must consider whether it might reasonably be true although not convinced of its truth. Furthermore, he gave no reason whatever for any of his beliefs or disbeliefs nor does he seem from from the grounds of his judgment to have warned himself that the complainant was an accomplice.

In addition, the O.C.P.D. gave inadmissible evidence as to the statements made by the accused in the course of the police investigation. It is true that the District Judge states in his grounds that in coming to a decision he paid no attention to that evidence but he also allowed the accused to be cross-examined about his statements to the O.C.P.D. to which he does not refer in the grounds of his judgment.

Lastly, the statement used to impeach the evidence of the third witness for the defence was not properly proved and this was undoubtedly an illegality. In view of the above reasons I quash the conviction and the accused is acquitted.

*Appeal Allowed.*

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## MUTHUSAMY v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Taylor, J.) December 17, 1947]

*Summary trial — Principles as to use of statements to impeach credit of witness — Evidence of bad character — Criminal Procedure Code S. 124 — Evidence Ordinance S. 145.*

In a summary trial the Magistrate should remember (a) that the trial is summary; (b) that the evidence must be confined to what is legally relevant; (c) that where the rule of evidence is explicit it must be enforced strictly on both sides; (d) that where the rule is discretionary, for example, as to points which are remote or only affect credit, the discretion must be exercised with regard to the real gravamen of the charge.

CRIMINAL APPEAL.

*W. H. Salt* for the Appellant.

*J. N. C. Kilner* (Crown Counsel) for the Respondent.

**Taylor, J.** : — In this case the accused, who is a lorry driver, was charged with house trespass with the intent to intimidate the occupant, and also with assault, under section 352, Penal Code.

The case for the Crown was that the accused went to the complainant's house and protested against the alleged participation of the complainant's son in writing a petition against certain persons, including tl. accused; after some argument the complainant asked the accused to leave his house but he did not go and threatened to hit the complainant. The accused also made as though to strike another person with a torch but the blow was averted.

Now it should have been clear from the charges and the opening statement of the prosecuting officer that no blood had been shed and that the offence, if any, was not serious. But all concerned, including I fear the learned Magistrate, partly lost their sense of proportion and instead of sticking to essentials and ending the case in an hour or two they allowed it to grow into a local cause celebre, the record of which extends to thirty pages.

I am well aware of the difficulties which attend cases of this kind, of the litigiousness of certain classes and of the desire for thoroughness among conscientious officers. I will therefore try to explain one or two points in the hope that it may be of some help to them. First, they must make themselves thoroughly familiar with those portions of the Procedure and Evidence Codes which are of frequent application in Magistrate's Courts. These are neither lengthy nor hard to pick out; they should be read again and again at intervals until they are so impressed on the mind of the officer that he applies them almost instinctively as the occasion arises. The main points are :—

(a) That the trial is summary;
(b) That the evidence must be confined to what is legally relevant;
(c) That where the rule of evidence is explicit it must be enforced strictly, on both sides.

(d) That where the rule is discretionary, e.g. as to points which are remote or only affect credit, the discretion must be exercised with regard to the real gravamen of the charge.

In general what was said is irrelevant and words are almost always less significant than deeds. The witnesses should be told to describe what they saw and did. Even if they cannot tell their tale without repeating accompanying talk much of it can safely be omitted from the record.

It is of the first importance to apply these principles from the start. If the complainant is indulged in chief, it obviously becomes much more difficult to control the cross-examination.

In this case nearly a page of the complainant's evidence-in-chief, (from line 75) could well have been omitted.

If an advocate says something apparently off the point the Magistrate should stop him before the question is interpreted to the witness and ask, e.g. under what provision of law the proposed question falls. He may, of course, try to defeat the Court by taking longer to argue the point than it would take to record the answer. If he does so it is nearly always safe to exclude the question. It is the duty of the advocate to prepare his case with due regard to the real issues and with special care for the law of evidence. If he cannot shew tersely that a proposed question is relevant he cannot complain if the Magistrate promptly excludes it under section 5 which provides that evidence may be given of legally relevant facts "and of no others". These words are mandatory.

More important even than preventing waste of time, is the fact — illustrated more than once in this case — that discursiveness often lets in something which is definitely inadmissible in law and this may vitiate the whole trial.

I will now try to explain the combined effect of sections 124 of the Procedure Code and 145 of the Evidence Ordinance regarding police investigation statements.

The basic principle is that the Court is to decide the facts on the sworn evidence given in Court. What a witness said on some other occasion is *prima facie* irrelevant and if unsworn it is *prima facie* less reliable. But if the witness has given one version of the incident to the police and gives a different version to the Court, it becomes a question whether his evidence can be relied on and therefore the former statement can — by the prescribed procedure — be used to impeach his credit. The prosecution are not entitled to use the statement, as they were allowed to do in this case, to cross-examine their own witness, not to shake his credit but to try to establish their view of the meaning of a doubtful passage in their own translation.

But the Magistrate went a great deal further. He completely misunderstood the principle of using the former statement to impeach credit and took the view that the former statement could be "put in" (it was never properly proved) and that the Court could then choose whether to accept the unsworn police statement, or the witness's sworn statement in Court, as his evidence of the incident. This is utterly illegal. In no case can the former statement become his evidence. If the two are so different on an essential point that the Court cannot accept his evidence, then he is discredited. If he is the only witness to that fact, the fact is not proved and the accused may be acquitted in consequence. It is for the Public Prosecutor to decide later whether in such a case the witness should be prosecuted for perjury.

The proper way to apply the sections is this. On the request of either side, the Court reads the former statement. If there is no serious discrepancy the Court so rules and no time is wasted. The first necessity is to read it with the confident expectation that it will be different from the evidence but looking judicially to see whether the difference really is so serious as to suggest that the witness is unreliable.

Differences may be divided into four classes :—

(a) Minor differences, not amounting to discrepancies;

(b) Apparent discrepancies;

(c) Serious discrepancies;

(d) Material contradictions.

Minor differences are attributable mainly to differences in interpretation and the way in which the statement was taken and sometimes to differences in recollection. A perfectly truthful witness may mention a detail on one occasion and not remember it on another. A mere omission is hardly ever a discrepancy. The police statement is usually much briefer than the evidence. Both the statement and the evidence are usually narratives reduced from question and answer. The witness is not responsible for the actual expressions used in either, and all the less so where he does not speak English.

If the police statement gives an outline of substantially the same story there being no apparently irreconcilable conflict between the two on any point material to the issue, the Magistrate should say at once

"The difference is not such as to affect his credit" and hand the statement back.

If, however, the difference is so material as probably to amount to a discrepancy affecting the credit of the witness, the Court may permit the witness to be asked whether he made the alleged statement. If he denies having made it, then either the matter must be dropped or the document must be formally proved, by calling the writer or, if he is not available, by proving in some other way that the witness did make the statement.

If the witness admits making the former statement, or is proved to have made it, then the two conflicting versions must be carefully explained to him, preferably by the Court, and he must have a fair and full opportunity to explain the difference. If he can, then his credit is saved, though there may still be doubt as to the accuracy of his memory. This procedure is cumbersome and slow and therefore should not be used unless the apparent discrepancy is material to the issue.

In this trial the witness Usop said :—

> "All the present witnesses were there but I did not notice Mansoor . . . there were many people there".

In his investigation statement he had said :—

> "I saw A,B,C. and one Mansoor there".

The general tenor of his statement accorded with his evidence. Now A, B and C, and also Mansoor, had all given evidence and it was not disputed that Mansoor had in fact been present at the incident. Clearly, therefore, this difference was at the most only a difference in recollection as to one of a number of persons and no further explanation was necessary. The police prosecutor ought not to have referred to it. When he did, the Magistrate should not have allowed him to cross-examine on it. Counsel for the defence, of course, further cross-examined on it and he elicited that Mansoor had been mentioned in answer to a leading question. This was a reasonable explanation. But the point is that the Court elaborately investigated a point of no significance. If Mansoor had been one of the accused persons, the case would have been different because then the question whether or not Mansoor was present would have been in issue.

There is one other point of procedure. It is correct that the accused himself must elect whether to give evidence or not; his advocate cannot choose for him. But there is no objection whatever to the accused consulting his counsel and he should be allowed a minute or so to do that if he so desires.

There was another and serious illegality. The learned Magistrate says in his judgment :—

> "Evidence was brought that accused is a quarrelsome person and that he had quarrelled before and on other occasions".

Evidence that the accused has a bad character is irrelevant during the trial.

After conviction it appeared that accused had been bound over in $50 to keep the peace — period not stated — but this was 18 years ago. This was not a conviction and was too long ago to be a ground for severity.

On the whole case I am of opinion that there was sufficient admissible evidence to support the conviction on both charges but that the undue protraction of the case and the misreception of evidence (for both of which the defence were partly responsible) led the Magistrate to take too serious a view.

I therefore varied the consecutive sentences of four and one months rigorous imprisonment to an order that the accused be released on probation on giving security for his good conduct for nine months.

*Sentence Varied.*

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## CHINNIAH AND ANOR. v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Evans, J.) December 19, 1947]

*Penal Code Ss. 383 and 384 — Extortion — Charge — Criminal Procedure Code Ss. 153 and 316 (b).*

In this case the appellants had been convicted on the following three charges of extortion (1) that they between 28th May, 1947 and 10th July, 1947 at Taiping did extort various sums totalling $620.00 from one Letchumanan Chettiar by putting the said Letchumanan in fear of bodily injury and that they had thereby committed an offence under S. 384 of the Penal Code (2) that they between 30th April, 1947 and 28th July, 1947 at Taiping did extort various sums of money totalling $720.00 from one Sockalingam Chettiar by putting the said Sockalingam Chettiar in fear of bodily injury and that they had thereby committed an offence under S. 384 of the Penal Code (3) that they on 8th July 1947 at Taiping did extort the sum of $100.00 from one Suppiah Pillay by putting the said Suppiah Pillay in fear of bodily injury and that they had thereby committed an offence punishable under S. 384 of the Penal Code. They appealed.

**Held**, (1) that in the offence of extortion the criminal act is the "obtaining" and an extortioner cannot, any more than a thief be said to take by instalments; (2) that each taking constitutes a separate offence and therefore the date mentioned in the charge should be the date of the actual receipt of the money; (3) that in this case there were several offences included in the first two charges and that those charges were therefore bad; (4) that as regards to the third charge, the prosecution had failed to prove that the payment was made on the date mentioned in the charge and therefore the conviction was wrong.